

Mitchell v. Billmeyer (In re CCC BES, Inc.), Civ. No. 92-1282-MA  
(D. Or. Jan. 5, 1993) (Marsh, D.J.)  
unpublished affirming J. Perris

A creditor appealed a bankruptcy court order approving the compromise of several preference actions. The District Court held that the bankruptcy court may approve a compromise only if it is fair and equitable. In making that determination, the court must consider: (1) the probability of success in the litigation; (2) the difficulties, if any, to be encountered in collection; (3) the complexity, expense, inconvenience and delay attributable to the litigation; (4) the paramount interest of the creditors and a proper deference to their reasonable views. The bankruptcy court did not abuse its discretion in approving the compromise.

The creditor contended that the Notice of Intent to Settle was defective because it failed to specify all the reasons why the trustee believed settlement was fair and equitable. It is questionable whether the alleged technical defect in the notice could be grounds for reversal. In any event, the bankruptcy judge had cured any such defect by allowing the creditor additional time to prepare for the hearing after the creditor was completely apprised of the trustee's reasons for wanting to settle.

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CLERK, U.S. DISTRICT COURT  
DISTRICT OF OREGON  
PORTLAND, OREGON

U.S. BANKRUPTCY COURT  
DISTRICT OF OREGON  
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TERENCE H. DUNN, CLERK

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

In re

CCC BES, Inc., fka McLean  
Clinic, P.C.,

Debtor.

JOHN MITCHELL, Trustee,

Plaintiff,

v.

DANIEL K. BILLMEYER,  
JOSEPH L. EMERICH, JACK  
L. CHITTY, RUDOLPH B.  
STEVENS, dba BECS  
Enterprises,

Defendants.

JOHN MITCHELL, Trustee,

Plaintiff,

v.

RODNEY CONNOR,

Defendant.

Bankruptcy No. 389-34026-S07

Civil No. 92-1282-MA

Adversary No. 91-3489

OPINION

Adversary No. 91-3467

1 - OPINION

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1	JOHN MITCHELL, Trustee,	)	
2	Plaintiff,	)	
3	v.	)	Adversary No. 91-3466
4	RUDOLPH B. STEVENS,	)	
5	Defendant.	)	
6	<hr/>		
7	JOHN MITCHELL, Trustee,	)	
8	Plaintiff,	)	Adversary No. 91-3465
9	v.	)	
10	LEE T. CORDOVA,	)	
11	Defendant.	)	
12	<hr/>		
13	JOHN MITCHELL, Trustee,	)	
14	Plaintiff,	)	Adversary No. 91-3464
15	v.	)	
16	JACK L. CHITTY,	)	
17	Defendant.	)	
18	<hr/>		
19	JOHN MITCHELL, Trustee,	)	
20	Plaintiff,	)	Adversary No. 91-3463
21	v.	)	
22	DANIEL K. BILLMEYER,	)	
23	Defendant.	)	
24	<hr/>		
25	Bradley O. Baker		
26	DUNN, CARNEY, etc.		
	Suite 1500		
	851 S.W. Sixth Avenue		
	Portland, OR 97204-1357		
	Attorneys for Plaintiff and Appellee John Mitchell		

2 - OPINION

1 David R. Kluge  
2 Suite 100  
3 829 S.E. 182nd Avenue  
4 Portland, OR 97233

5 Attorney for Appellant National Management Services, Inc.  
6 MARSH, Judge.

7 The appellant National Management Services, Inc. ("NMS"), a  
8 claimant in the above-listed bankruptcy proceeding, brings this  
9 appeal challenging an order by the United States Bankruptcy Court  
10 for the District of Oregon approving the bankruptcy trustee's  
11 compromise and settlement of six preference claims. For the  
12 reasons stated below, the order of the Bankruptcy Court is  
13 AFFIRMED.

#### 14 BACKGROUND

15 Each of the individual defendants listed in the adversary  
16 proceedings is a doctor and is or has been an officer, director  
17 and/or shareholder in the bankruptcy debtor. Defendant BECS  
18 Enterprises is a partnership composed of four of the individual  
19 defendants: Doctors Billmeyer, Emerich, Chitty and Stevens.

20 The day before filing its chapter 7 bankruptcy petition, the  
21 debtor made payments to the individual defendants as follows:  
22 \$2,400 each to Doctors Billmeyer, Emerich, Chitty and Stevens, and  
23 \$1,500 to Dr. Connor. Previously, the debtor also made two  
24 payments to BECS Enterprises each in the amount of \$12,987.00 for  
25 antecedent past due rent. The bankruptcy trustee brought these  
26 adversary proceedings to avoid and recover these preferential  
transfers.

Subsequently, the bankruptcy trustee agreed to accept \$18,800

1 as a compromise and settlement of the six adversary proceedings.<sup>1</sup>  
2 The trustee moved the bankruptcy court for an order authorizing  
3 the settlement of the preference claims, and served a Notice of  
4 Intent to Compromise and Settle Claim on the debtor, creditors and  
5 interested parties. NMS received this notice as it has an  
6 unsecured claim against the bankruptcy estate. NMS then filed a  
7 timely objection to the trustee's motion.

8 Following three hearings on the trustee's motion, the  
9 bankruptcy court entered an order authorizing the settlement of  
10 the preference claims. The bankruptcy court found that the  
11 settlement amount was fair and equitable after taking into account  
12 the creditors' interest, the costs of litigating the claims, the  
13 relatively high recovery on the claims against the individual  
14 defendants and the risk of a ruling adverse to the estate based on  
15 a "new value" defense on the claim against BECS Enterprises.

#### 16 DISCUSSION

17 A bankruptcy court's order approving a trustee's application  
18 to compromise a controversy is reviewed for an abuse of  
19 discretion. In re A & C Properties, 784 F.2d 1377, 1380 (9th Cir.  
20 1986), cert. denied, 479 U.S. 854 (1986). The bankruptcy court  
21 may approve a compromise only if it is fair and equitable. In re  
22 Woodson, 839 F.2d 610, 620 (9th Cir. 1988). In determining

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23  
24 <sup>1</sup> Though the settlement was "global," i.e. , contingent on  
25 a resolution of all the claims, the settlement amounts attributed  
26 to each claim are as follows: \$1,900 each in regard to the claims  
against Doctors Billmeyer, Chitty, Cordova and Stevens; \$1,200 in  
regard to the claim against Doctor Connor; and \$10,000 in regard  
to the claim against BECS Enterprises.

1 whether the compromise is proper, the court must consider: (1) the  
2 probability of success in the litigation; (2) the difficulties, if  
3 any, to be encountered in collection; (3) the complexity of the  
4 litigation involved, and the expense, inconvenience and delay  
5 necessarily attending it; and (4) the paramount interest of the  
6 creditors and a proper deference to their reasonable views in the  
7 premises. Id. (citing In re A & C Properties, 784 F.2d at 1381).  
8 "The law favors compromise and not litigation for its own sake,  
9 and as long as the bankruptcy court amply considered the various  
10 factors that determined the reasonableness of the compromise, the  
11 court's decision must be affirmed." In re A & C Properties, 784  
12 F.2d 1381 (citations omitted).

13 Here appellant argues that the bankruptcy court erred in  
14 approving the settlement based on the attendant costs of  
15 litigating the claims. It was appellant's position before the  
16 bankruptcy court that the amounts at issue in the claims and the  
17 likelihood of prevailing on the claims justified the additional  
18 litigation expense.

19 Contrawise, the bankruptcy court determined that the cost of  
20 litigating the claim against BECS Enterprises would be exacerbated  
21 because that defendant could raise a "new value" defense. The  
22 "new value" defense is set forth in section 547(c)(4) of the  
23 Bankruptcy Code. 11 U.S.C. § 547(c)(4) (1992). Section 547(c)(4)  
24 provides that a trustee may not avoid a transfer to the extent  
25 that transfer was "to or for the benefit of a creditor, to the  
26 extent that, after such transfer, such creditor gave new value to

1 or for the benefit of the debtor." The bankruptcy court  
2 determined that BECS could argue that at least one of the past due  
3 lease payments was given for new value; the new value being that  
4 BECS, after receiving the past due payment, allowed the debtor to  
5 continue in its lease despite the fact that BECS had the right to  
6 terminate the lease.

7 The issue of whether forbearance in exercising a right  
8 constitutes new value has not been addressed by the Ninth Circuit.  
9 Courts in other jurisdictions have reached opposite results.  
10 Compare Drabkin v. A & I Credit, 800 F.2d 1153, 1159 (D.C. Cir.  
11 1986), with In re Quality Plastics, Inc., 41 B.R. 241 (Bankr. W.D.  
12 Mich. 1984) (officer-creditor's forbearance constituted new  
13 value). Clearly, the defense could have been raised and  
14 litigation costs would have been expended in resolving it.  
15 Furthermore, the lack of authority on the issue in this circuit  
16 increases the potential for an appeal and its attendant costs.  
17 When these considerations are coupled with the risk of an adverse  
18 ruling against the trustee on this claim and the costs necessarily  
19 incurred in litigating any claim to judgment, the settlement of  
20 the BECS claim cannot be labeled as unfair or inequitable, and the  
21 bankruptcy court did not abuse its discretion in approving it.

22 As to the claims against the individual defendants, the  
23 trustee settled those claims for \$2,300 less than the claims  
24 sought. The bankruptcy court found that the difference would have  
25 quickly been expended as litigation costs if those claims were  
26 pursued because defendants' counsel indicated he would raise a

1 solvency defense to those claims. Indeed, the difference could  
2 have been expended as the natural costs of pursuing these five  
3 claims all the way through judgment. Again, I find that the  
4 bankruptcy court did not abuse its discretion in approving the  
5 settlement of these claims.

6 Appellant next argues that the settlement should not have been  
7 approved by the bankruptcy judge because it did not account for  
8 potential claims for moneys paid to these defendants beyond the 90  
9 days but within 1 year prior to the date of bankruptcy. However,  
10 as the bankruptcy court noted, it approved these settlements only  
11 as to the checks listed in these claims against the defendants and  
12 not as to all possible claims against the defendants. This  
13 settlement does not act as a release of any other potential claims  
14 against these defendants. Accordingly, I find that the bankruptcy  
15 court did not abuse its discretion in approving this settlement  
16 even though it does not account for all potential claims against  
17 these defendants.

18 Finally, appellant argues that the settlement should not have  
19 been approved because the Notice of Intent to Compromise and  
20 Settle Claim fails to set forth all the reasons why the claims are  
21 being settled. In particular, the notice failed to set forth the  
22 new value issue. However, when the bankruptcy judge noted this  
23 deficiency, she set an additional hearing and provided appellant's  
24 counsel with additional time to prepare for and do discovery  
25 regarding the new value issue. Thus, even if the notice was  
26 defective, the bankruptcy court cured the deficiency and appellant



1 was not prejudiced by the deficiency. Indeed, appellant cites no  
2 authority, and I cannot find any, which requires the bankruptcy  
3 court to reject a settlement because of a mere technical defect in  
4 the notice. Accordingly, I find that the bankruptcy court did not  
5 abuse its discretion in approving the settlement despite the  
6 deficiency in the notice because appellant was given actual notice  
7 of the issue by the bankruptcy court, was given a reasonable time  
8 to prepare for a hearing on the issue, and was not prejudiced by  
9 the deficiency.

10 CONCLUSION

11 Based on the foregoing, the order of the Bankruptcy Court is  
12 AFFIRMED.

13 DATED this 4 day of January, 1992.

14 Malcolm F. Marsh  
15 Malcolm F. Marsh  
16 United States District Judge  
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